No. 95-2080 (2)

In The

Supreme Court of the United States

Supreme Court, U.S.
FILED
AUG 12 1996
CLERK

October Term, 1995

VERONICA ZUCKER, individually and on behalf of a class of others similarly situated,

Petitioner,

vs.

ALAN G. QUASHA, JACK E. ROSENFELD, RALPH DESTINO, J. DAVID HAKMAN, S. LEE KLING, THEODORE H. KRUTTSCHNITT, JEFFREY LAIKIND, ELIZABETH VALK LONG, EDMUND R. MANWELL,

(Continued)

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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30 pp

GERALDINE STUTZ, ROBERT F. WRIGHT, WAYNE P. GARTEN, HANOVER DIRECT INC., SUN LIFE INSURANCE COMPANY OF AMERICA, MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., ALEX BROWN & SONS, INC., individually and on behalf of a class of underwriters similarly situated,

Respondents.

CORPORATE DISCLOSURE STATEMENT

Respondents Hanover Direct, Inc., Sun Life Insurance Company of America, Merrill Lynch, Pierce, Fenner & Smith, Inc., and Alex Brown & Sons, Inc. make this statement pursuant to Rule 29.6 of the Rules of the Supreme Court.

HANOVER DIRECT, INC. SUBSIDIARIES AND AFFILIATES

Aegis Catalog Corporation	Delaware
Aegis Retail Corporation	Delaware
Aegis Safety Holdings, Inc.	Delaware
Aegis Ventures, Inc.	Delaware
American Down & Textile Company	Wisconsin
The Austad Company	South Dakota
Austad Holdings, Inc.	Delaware
BC of Tennessee	Tennessee
Brawn of California, Inc.	California
Brawn Wholesale Corp.	California
Company Store Holdings, Inc.	Delaware
The Company Factory, Inc.	Wisconsin

The Company Office, Inc.	Wisconsin
The Company Store, Inc.	Wisconsin
D.M. Advertising, Inc.	New Jersey
Gump's By Mail	Delaware
Gump's Catalog, Inc.	Delaware
Gump's Corp.	California
Gump's Holdings, Inc.	Delaware
H&H 1600 Broadway Corporation	New York
H.H.B.K. 45th Street Corporation	New York
H.H.B.K., Inc.	New York
Hanover Casuals, Inc.	Delaware
Hanover Catalog Holdings, Inc.	Delaware
Hanover Direct Mail Marketing, Inc.	Pennsylvania
Hanover Direct Pennsylvania, Inc.	Pennsylvania
Hanover Direct Virginia, Inc.	Delaware
Hanover Finance Corporation	Delaware
Hanover List Management, Inc.	New Jersey

Hanover Realty, Inc.	Virginia
Hanover Syndication Corporation	Pennsylvania
Hanover Ventures, Inc.	Delaware
Henre, Inc.	Delaware
The Horn & Hardart Company, Inc.	New York
The Horn & Hardart Consulting Corporation	New York
The Horn & Hardart Realty Company, Inc.	New York
LWI Holdings, Inc.	Delaware
LWI Retail, Inc.	Ohio
Leichtung of Michigan, Inc.	Michigan
Scandia Down Corporation	Delaware
Software Investment Corporation	Delaware
Tweeds, Inc.	Delaware
Tweeds of Vermont, Inc.	Delaware
York Fulfillment Company, Inc.	Pennsylvania

MERRILL LYNCH & CO. INC.
SUBSIDIARIES AND AFFILIATES

Merrill Lynch & Co., Inc.	Delaware
Merrill Lynch, Pierce, Fenner & Smith Incorporated	Delaware
Broadcort Capital Corp.	Delaware
Merrill Lynch & Co., Canada Ltd.	Ontario
Merrill Lynch Canada Incorporated/ Incorporee	Nova Scotia
Merrill Lynch Life Agency Inc.	Washington
Wagner Stott Clearing Corp.	Delaware
Merrill Lynch Bank & Trust Co.	New Jersey
Merrill Lynch Capital Services, Inc.	Delaware
Merrill Lynch Government Securities Inc.	Delaware
Merrill Lynch Money Markets Inc.	Delaware
Merrill Lynch Group, Inc.	Delaware
Merrill Lynch Capital Partners, Inc.	Delaware
Merrill Lynch Derivative Products, Inc.	Delaware
Merrill Lynch Futures Inc.	Delaware

Merrill Lynch Group Holdings Limited	Ireland
Merrill Lynch Capital Markets Bank Limited	Ireland
Merrill Lynch Insurance Group, Inc.	Delaware
Merrill Lynch Life Insurance Company	Arkansas
ML Life Insurance Company of New York	New York
Merrill Lynch International Finance Corporation	New York
Merrill Lynch International Bank Limited	England
Merrill Lynch Bank (Suisse) S.A.	Switzerland
Merrill Lynch Mortgage Capital Inc.	Delaware
Merrill Lynch National Financial	Utah
Merrill Lynch Trust Bank of Michigan	Michigan
Merrill Lynch Trust Company	New Jersey
Merrill Lynch Business Financial Services Inc.	Delaware
Merrill Lynch Credit Corporation	Delaware
Merrill Lynch Home Equity Acceptance, Inc.	Delaware

Merrill Lynch Trust Company	Florida
Merrill Lynch Financial Data Services, Inc.	Florida
Merrill Lynch Trust Company of America	Illinois
Merrill Lynch Trust Company of California	California
Merrill Lynch Trust Company of Texas	Texas
Merrill Lynch Investment Partners Inc.	Delaware
ML IBK Positions Inc.	Delaware
Merrill Lynch Capital Corporation	Delaware
ML Leasing Equipment Corp.	Delaware
Princeton Services, Inc.	Delaware
Merrill Lynch International Incorporated	Delaware
Merrill Lynch International (Australia) Limited	New South Wales
Merrill Lynch International Bank	United States
Merrill Lynch International Holdings Inc.	Delaware
Merrill Lynch Bank (Austria) Aktiengesellschaft A.G.	Austria
Merrill Lynch Bank and Trust Company (Cayman) Limited	Cayman Islands, British West Indies

Merrill Lynch International & Co.	Netherlands Antilles
Merrill Lynch Capital Markets A.G.	Switzerland
Merrill Lynch Europe PLC	England
Merrill Lynch International Limited	England
Merrill Lynch Capital Markets PLC	England
Merrill Lynch, Pierce, Fenner & Smith (Brokers & Dealers) Limited	Engl
Merrill Lynch Trust Company (Jersey) Limited	Jersey, Channel Islands
Merrill Lynch Europe Ltd.	Cayman Islands, British West Indies
Merrill Lynch Holding GmbH	Germany
Merrill Lynch Bank A.G.	Germany
Merrill Lynch GmbH Germany Merrill Lynch Holding S.A.F.	France
Merrill Lynch Capital Markets (France) S.A.	France
Merrill Lynch Far East Limited	Hong Kong
Merrill Lynch Japan Incorporated	Delaware

ALEX.BROWN & SONS INCORPORATED PARENT ENTITIES AND SUBSIDIARIES

Alex. Brown Incorporated (parent)	Maryland
Alex.Brown & Sons Incorporated	Maryland
Alex.Brown & Sons Holding Limited	United Kingdom
Alex.Brown & Sons Investments Limited	United Kingdom
Alex.Brown & Sons Finance Limited	Maryland
Alex.Brown & Sons Limited	United Kingdom
Alex.Brown & Sons Financial Corporation	Delaware
Alex.Brown & Sons Capital Advisory Incorporated	Maryland
Investment Company Capital Corp.	Maryland
Brown & Glenmede Holdings Inc.	Maryland
Alex.Brown Capital Advisory & Trust Company	Maryland
BAT Commingled Fund Manager Inc.	Maryland
Alex.Brown Insurance Agency Incorporated	Maryland
Alex.Brown Insurance Agency of Mass. Inc.	Massachusetts

Alex.Brown Investments Incorporated	Maryland
ABS MB Ltd.	Maryland
TC Trustees Limited	United Kingdom
Alex.Brown Management Services, Inc.	Maryland
Alex.Brown Leasing Services Incorporated	Maryland
ABS Leasing Services Company	Illinois
Alex.Brown Mortgage Capital Corporation	Maryland
Alex.Brown Financial Services Incorporated	Maryland
Argent Incorporated	Maryland
AB Administrative Partner, Inc.	Maryland

SUN LIFE INSURANCE COMPANY OF AMERICA PARENT ENTITIES, SUBSIDIARIES AND AFFILIATES

Note: Effective July 7, 1995, Sun Life Insurance Company of America changed its name to SunAmerica Life Insurance Company.

SunAmerica, Inc. (parent corporation)	Arizona
SunAmerica Life Insurance Company	Arizona
SunAmerica Funding Corp.	Delaware

AMSUN Realty Holdings	California
SunAmerica Marketing, Inc.	Maryland
SunAmerica Advertising, Inc.	Georgia
SunAmerica Investments, Inc.	Delaware
Accelerated Capital Corp.	Florida
1401 Sepulveda Corp.	California
SunAmerica Louisiana Properties, Inc.	California
SunAmerica Real Estate and Office Administration, Inc.	Delaware
SunAmerica Affordable Housing Partners, Inc.	California
SUN-PLA, Inc.	California
Hampden I & II Corp.	California
Sunport Holdings, Inc.	California
Sunport Property Co.	Florida
Sun Chino Property, Inc.	California
SunAmerica Mortgages, Inc.	Delaware
Sun Princeton I, Inc.	California
Sun Princeton II, Inc.	California

Advantage Capital Corporation	New York
SunAmerica Financial, Inc.	Georgia
SunAmerica Planning, Inc.	Maryland
SunAmerica Securities, Inc.	Delaware
Anchor Insurance Services, Inc.	Hawaii
Sun Mexico Holdings, Inc.	Delaware
Sun Cancun I, Inc.	Delaware
Sun Cancun II, Inc.	Delaware
Sun Ixtapa I, Inc.	Delaware
Sun Ixtapa II, Inc.	Delaware
Sun Hechs, Inc.	California
SunAmerica Travel Services, Inc.	California
SAI Investment Adviser, Inc.	Delaware
Resources Trust Company	Colorado
KBHS, Inc.	California
Home Systems Partners, a California Ltd. Partnership	California
Extraneous Holdings Corp.	Delaware

Sun Royal Holdings Corporation	California
Royal Alliance Associates, Inc.	Delaware
First SunAmerica Life Insurance Company	New York
SunAmerica National Life Insurance Company	Arizona
Anchor National Life Insurance Company	Arizona
Anchor Pathway Fund (a Massachusetts business trust)	Massachusetts
Anchor Series Trust (a Massachusetts business trust)	Massachusetts
SunAmerica Series Trust (a Massachusetts business trust)	Massachusetts
Saamsun Holdings Corp.	Delaware
SAM Holdings Corporation	California
SunAmerica Asset Management Corp.	Delaware
Anchor Investment Adviser, Incorporated	Maryland
SunAmerica Capital Services, Inc.	Delaware
SunAmerica Fund Services, Inc.	Delaware
ANF Property Holdings, Inc.	California

Capitol Life Mortgage Corp.	Delaware
UG Corporation	Georgia
Export Leasing FSC, Inc.	U.S. Virgin Islands
SunAmerica Virginia Properties, Inc.	California
SunAmerica Realty Partners	California
SAL Investment Group, Inc.	California
CalFarm Life Insurance Company	California
Ford Life Insurance Company	Michigan
Sun Quorum LLC	Delaware
Imperial Premium Finance, Inc.	Delaware
Imperial Premium Finance, Inc.	California
SunAmerica Financial Resources, Inc.	Delaware
IPF Funding Corp.	Delaware
SA Investment Group, Inc.	California
SunAmerica Capital Trust I	Delaware
SunAmerica Capital Trust II	Delaware
SunAmerica Capital Trust III	Delaware

SunAmerica Capital Trust IV	Delaware
Stanford Ranch, Inc.	Delaware
Stanford Ranch, Inc.	California
New California Life Holdings, Inc.	Delaware
Aurora National Life Assurance Company	California

TABLE OF CONTENTS

	Page
Corporate Disclosure Statement	i
Table of Contents	xv
Table of Citations	xvi
Statement of the Case	1
A. The Complaint	1
B. The Proceedings Below	3
Reasons for Denying the Writ	4
I. There Is No Conflict Between The Circuits Regarding The Disclosure Of Interim Financial Results From An Incomplete Fiscal Quarter.	4
A. Neither *Zucker v. Quasha* Nor *Shaw v. Digital Equipment Corp.* Adopted An Inflexible Rule Regarding The Disclosure Of Financial Data From An Incomplete Quarter.	4
B. The Decisions In *Zucker v. Quasha* And *Shaw v. Digital Equipment Corp.* Turn On The Unique Facts Of Each Case.	8
Conclusion	11

Page

TABLE OF CITATIONS

Cases Cited:

In re Marion Merrell Dow, Inc. Securities Litigation, [1994-95 Transfer Binder], Fed. Sec. L. Rep. (CCH) ¶98,357 (W.D. Mo. 1994) 5

In re Union Carbide Class Action Sec. Litigation, 648 F. Supp. 1322 (S.D.N.Y. 1986) 3

In re Verifone Sec. Litigation, 784 F. Supp. 1471 (N.D. Cal. 1992), *aff'd sub. nom. Halkin v. Verifone*, 11 F.3d 865 (9th Cir. 1993) 5

In re Wells Fargo Securities Litigation, 12 F.3d 922 (9th Cir. 1993) 5

In re Worlds of Wonder Sec. Litigation, 35 F.3d 1407 (9th Cir. 1994) 5

Renz v. Schreiber, 832 F. Supp. 766 (D.N.J. 1993) 5

Shaw v. Digital Equipment Corp., 82 F.3d 1194 (1st Cir. 1996) 4, 6, 7, 8, 9, 10

Zucker v. Quasha, 891 F. Supp. 1010 (D.N.J. 1995), *aff'd*, 82 F. 3d 408 (3d Cir. 1996) 3, 4, 5, 7, 8, 9, 10

Contents

Page

Statutes Cited:

15 U.S.C. § 77k 1

15 U.S.C. § 77*l*(2) 1

15 U.S.C. § 77o 1

Rules Cited:

SEC Rule 415 ..... 6, 8, 9

Other Authorities Cited:

17 C.F.R. § 230.415(a) 8

Hanover Direct, Inc., Sun Life Insurance Company of America, Alan G. Quasha, Jack E. Rosenfeld, Ralph Destino, J. David Hackman, S. Lee Kling, Theodore H. Kruttschnitt, Jeffrey Laikind, Elizabeth Valk Long, Edmund R. Manwell, Geraldine Stutz, Robert F. Wright, Wayne P. Garten, Merrill Lynch, Pierce Fenner & Smith, Inc. and Alex Brown & Sons, Inc. (collectively, "Respondents"), oppose the Petition for Writ of Certiorari filed by Veronica Zucker ("Petitioner").

STATEMENT OF THE CASE

A. The Complaint

This case arose out of a public offering of 8 million shares of Hanover Direct, Inc. ("Hanover") common stock pursuant to a registration statement and prospectus filed March 30, 1994 (the "Prospectus"). Hanover is a direct specialty retailer which publishes a portfolio of 14 branded and specialty catalogs offering home furnishings, general merchandise and apparel. On March 31, 1994 petitioner allegedly purchased 3,000 shares of Hanover common stock at a price of $6.375 per share. Approximately four and a half months later, on August 15, 1994, Hanover's common stock is alleged to have traded at $4.06 per share.

Petitioner filed a Complaint in the United States District Court for the District of New Jersey on September 2, 1994 asserting claims under sections 11, 12(2) and 15 of the Securities Act of 1933 (the "Securities Act"), 15 U.S.C. §§ 77k, 77l(2) and 77o. The Complaint did not allege that the Prospectus contained a single false or misleading affirmative statement of fact but rather alleged that the Prospectus was materially misleading because it omitted allegedly material information concerning,

inter alia, the rate of returns of merchandise by Hanover's customers.[1]

The Prospectus, which was filed prior to the completion of the first quarter, disclosed that Hanover has a return policy which permits customers to return merchandise for a refund if not satisfied for any reason. The Prospectus further disclosed that the rate of such returns for the entire calendar year 1993 was approximately 13% of gross shipments. Petitioner did not allege that the disclosure of historical performance for calendar year 1993 was false. Nor did she allege that Hanover made any prediction, one way or another, regarding the future anticipated rate of return. Rather, Petitioner asserted that the March 30 Prospectus was misleading because Hanover's April 1994 10-Q, dated May 16, 1994, disclosed that, for the first quarter ending on April 2, 1994, the rate of returns was 15%, and that this rate purportedly constituted a material adverse "trend" which should have been disclosed in the Prospectus.

The Prospectus advised investors not only of the inherent uncertainties and intense competition in the direct retailing business, but also of the risks and problems associated with Hanover's most recent acquisition of three non-profitable catalogs. The Prospectus did not contain any representations or predictions regarding any future rate of growth, sales, revenues or profits.

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1. Petitioner also argued to the court below that the Prospectus was misleading because it omitted allegedly material information concerning Hanover's limited investment in two companies and Hanover's proprietary customer list. The district court properly dismissed Petitioner's Complaint with respect to each of those claimed material omissions, and Petitioner does not here assert error or a conflict between the circuit courts with respect to the disposition of those claims.

B. The Proceedings Below

In *Zucker v. Quasha*, 891 F. Supp. 1010 (D.N.J. 1995) the district court applied the settled principle that a plaintiff alleging an omission of material fact must identify " 'an affirmative statement that is made misleading by the material omission.'" 891 F. Supp. at 1014 (quoting *In re Union Carbide Class Action Sec. Litig.*, 648 F. Supp. 1322, 1326 (S.D.N.Y. 1986)). Accepting the allegations of Petitioner's complaint as true, the court held that Petitioner "failed to establish, as a matter of law, that [Hanover] made an affirmative statement in the Prospectus and Registration Statement relating to the rate of return on [Hanover's] merchandise that was misleading. . . ." 891 F. Supp. at 1016.

The court stated that Hanover's representation concerning the 13% return rate for calendar year 1993 was a "statement of historical performance" which Petitioner did not contest. *Id.* at 1015. Further, the court noted that Hanover "did not speculate as to current rates of return during the quarter in progress" and "did not predict future return rates or suggest that the 1993 rate was expected to continue." *Id.* Accordingly, the fact that the Prospectus did not discuss or mention a 2% rise in the return rate during a then incomplete fiscal quarter "did not render [the] statement of historical fact illegally false or misleading." *Id.*

The court further held that even if there was a duty to disclose data from an incomplete quarter, Petitioner failed to demonstrate that any compiled information or projections in fact existed which could have been disclosed, or which Petitioner could have relied on. 891 F. Supp. at 1016. Consequently, the court was "at a loss" to identify what information relating to return rates during the incomplete first quarter of 1994 was omitted from the Prospectus, which rendered the statements relating to the return rate in 1993 false and misleading. *Id.*

The Third Circuit Court of Appeals affirmed the decision of the District Court without opinion. 82 F.3d 408 (3d Cir. 1996) (Table No. 95-5428).

REASONS FOR DENYING THE WRIT

I.

THERE IS NO CONFLICT BETWEEN THE CIRCUITS REGARDING THE DISCLOSURE OF INTERIM FINANCIAL RESULTS FROM AN INCOMPLETE FISCAL QUARTER.

The sole reason advanced by Petitioner for the grant of certiorari is that this case purportedly presents "an important question in which there is a direct conflict among the Circuits." (Petition at 3). There is no such conflict. The Petition misstates both the decision of the court below, as well as the decision in *Shaw v. Digital Equipment Corp.*, 82 F.3d 1194 (1st Cir. 1996) in an effort to manufacture a "direct conflict" suitable to warrant certiorari. In fact, the First Circuit Court of Appeals in *Shaw* expressly distinguished *Zucker v. Quasha* on its facts, further underscoring the lack of any conflict between the circuit courts.

This case, like the *Shaw* case, turns on its own unique facts, involves the application of settled, noncontroversial principles of law and does not raise any serious issues under the federal securities laws.

A. Neither *Zucker v. Quasha* Nor *Shaw v. Digital Equipment Corp.* Adopted An Inflexible Rule Regarding The Disclosure Of Financial Data From An Incomplete Quarter.

Petitioner's argument for review of the opinion of the court below rests on the unsupported assertion that "the District Court adopted a 'complete fiscal period' rule," and that pursuant to that

rule, a seller of securities is never under a duty to disclose incomplete quarterly data. (Petition at 7). But the district court never adopted such an inflexible "rule."

The court noted that courts have been "reluctant to impose liability based upon a corporate official's failure to disclose financial data for a fiscal quarter in progress." 891 F. Supp. at 1015 (citing *In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1418-19 (9th Cir. 1994); *Renz v. Schreiber*, 832 F. Supp. 766, 781 (D.N.J. 1993)). Consistent with those decisions, the court was unwilling to find that such a duty to disclose incomplete financial data was triggered in this case, given the factual allegations of the complaint.

Indeed, despite those decisions, the court nonetheless assumed, *arguendo*, that there might be such a duty to disclose interim quarterly data, and still found nothing to support Petitioner's claims that Hanover's disclosures were misleading. The court held that "[e]ven if [Hanover] had some duty to disclose financial data for a fiscal quarter in progress," petitioner "simply failed to allege any facts capable of supporting a reasonable inference that [Hanover's] statement that the return rate for 1993 was 13% was misleading at the time it was made." 891 F. Supp. at 1016.[2]

Just as the court below did not set forth any *per se* rule with respect to disclosure of incomplete quarterly data, the court in

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2. *Accord In re Wells Fargo Securities Litigation*, 12 F.3d 922, 930 (9th Cir. 1993) (factually accurate statements of positive historical results do not create the impression of future continued positive results); *In re Marion Merrell Dow, Inc. Securities Litigation*, [1994-95 Transfer Binder], Fed. Sec. L. Rep. (CCH) ¶98,357 (W.D. Mo. 1994) (same); *In re Verifone Sec. Litig.*, 784 F. Supp. 1471, 1484 (N.D. Cal. 1992), *aff'd sub. nom. Halkin v. Verifone*, 11 F.3d 865 (9th Cir. 1993) (same).

Shaw v. Digital Equipment Corp., supra, specifically *declined* to adopt a "hard and fast rule" regarding the disclosure of interim financial information. 82 F.3d at 1210. There, purchasers of securities of Digital Equipment Corp. ("DEC") brought suit alleging securities fraud in connection with a public offering conducted pursuant to a "shelf registration statement" under SEC Rule 415(a). The offering commenced on March 21, 1994, a few days prior to the closing of DEC's third fiscal quarter then in progress. Approximately one week later DEC announced an operating loss of over $183 million for the quarter that had just closed, sending stock prices tumbling. 82 F.3d at 1199-1200.

Accepting as true plaintiff's allegation that DEC was in possession of "hard" material information about "unexpectedly large" losses being suffered in the nearly completed quarter, which indicated some "substantial likelihood" that the quarter would turn out to be "disastrous" and "an extreme departure from publicly known trends, and uncertainties," the court held that it could not conclude as a matter of law that such information was not subject to mandatory disclosure. 82 F.3d at 1211.

In so holding, the court rejected DEC's argument that the disclosure requirements of the Securities Act should be interpreted "so that they would *never* mandate the provision of current information about a company's performance in the quarter in progress at the time of a public offering, so long as the company satisfies its quarterly and annual periodic disclosure obligations under the Exchange Act." 82 F.3d at 1209 (emphasis in original).

The court was equally clear that it was explicitly rejecting "any bright-line rule that an issuer engaging in a public offering is obligated to disclose interim operating results for the quarter in progress whenever it perceives the possibility that the quarter's results may disappoint the market." *Id.* at 1210. As the court stressed:

> Far from it. Reasonable investors understand that businesses fluctuate, and that past success is not a guarantee of more of the same. There is always some risk that the quarter in progress at the time of an investment will turn out for the issuer to be worse than anticipated. The market takes this risk of variability into account in evaluating the company's prospects based on the available facts concerning the issuer's past historical performance, its current financial condition, present trends and future uncertainties.

Id.

Having rejected any *per se* rule regarding the disclosure of incomplete quarterly results, the First Circuit was also careful not to imply "that nondisclosure claims similar to those asserted by plaintiffs can never be disposed of as a matter of law." *Id.* at 1210. And, still further undermining Petitioner's contention that there is an intolerable conflict between *Shaw* and *Zucker*, the Court in *Shaw* expressly distinguished *Zucker* on its facts. 82 F.3d at 1211.

Given that the First Circuit Court of Appeals specifically and emphatically refused to adopt a *per se* rule regarding disclosure of interim financial data, and expressly distinguished *Zucker*, the purported "direct conflict" between the circuit courts envisioned by Petitioner and offered here in support of her Petition, simply does not exist.

B. The Decisions In *Zucker v. Quasha* And *Shaw v. Digital Equipment Corp.* Turn On The Unique Facts Of Each Case.

The significant factual differences between *Shaw* and *Zucker* further confirm that the "direct conflict" asserted in support of the Petition is illusory. For example, a critical distinction between the opinion below and *Shaw* is that the stock offering in *Shaw* was conducted pursuant to a "shelf registration" under SEC Rule 415(a). *See* 17 C.F.R. § 230.415(a). As the First Circuit Court of Appeals explained:

> The shelf registration rule permits a company to file a single registration statement covering a certain quantity of securities (register securities "for the shelf"), and then over a period of up to two years, with the appropriate updates of information, issue installments of securities under that registration statement (take the securities "down from the shelf") almost instantly, in amounts and at times the company and its underwriters deem most propitious.

82 F.3d at 1208 (footnotes omitted).

The First Circuit observed that the need for prompt and *continuous* disclosure is "particularly keen" when a corporation issues stock pursuant to a shelf registration statement, because absent such disclosure, an issuer anticipating a negative earnings announcement could time its offering of securities "from the shelf" to be completed prior to the public release of the known negative news, thereby allowing the issuer to exploit a "naked informational trading advantage." *Id.* at 1209.

The decision in *Shaw v. Digital Equipment Corp.* accordingly turned on the requirements of SEC Rule 415, which

the court noted was adopted to combat the potential for abuse inherent in the shelf registration process. Rule 415, the court observed, insures that " '[p]ost-effective amendments [to the initial registration statement] and prospectus supplements [would] serve to ensure that investors are provided with complete, accurate and current information at the time of the offering or sale of securities.' " 82 F.3d at 1208 (quoting Shelf Registration, SEC Release Nos. 33-6499, 34-20384, 35-23122, 1983 WL 35832 (SEC), at *9) (alteration in original).

Given the unique nature of the public offering in *Shaw* and the concerns it raised, the court understandably rejected defendant's position that "there can never be a duty to disclose internally known, pre-end-of quarter financial information." *Id.* at 1210. The court reasoned that defendant's argument would "cut[ ] severely" against the shelf registration rule which permits offerings to be made on a "continuous" basis because it envisions "continuous" disclosure. *Id.* at 1209.

In direct contrast to *Shaw,* the shelf registration rule, and any heightened disclosure obligations that might arise pursuant to it, were simply not before the court below. This important factual distinction further undermines Petitioner's claim of a conflict between the circuits regarding an important issue of law.

Yet another key distinction between *Shaw* and *Zucker* is that, unlike Petitioner here, the *Shaw* plaintiffs asserted that DEC management had in its possession, as of the March 21 offering, "hard data" regarding the company's ongoing quarter-to-date performance. 82 F.3d at 1211. That information indicated that the company would suffer "unexpectedly large losses for that quarter" and that the third fiscal quarter would be "disastrous." *Id.* The First Circuit repeatedly emphasized the central importance of plaintiff's allegation that hard data was on hand reflecting these "actual losses". Indeed, the Court emphasized

that the plaintiff's claim was sustainable *only* to the extent it related to the nondisclosure of hard material information as opposed to soft information in the nature of projections. 82 F.3d at 1211 n. 21.

In direct contrast, the court below held that Petitioner had utterly failed to identify *any* compiled information relating to return rates that existed during the incomplete first quarter of 1994 that was omitted from the Prospectus, and which rendered the statements relating to the return rate in 1993 misleading. 891 F. Supp. at 1016. Noting that the only information that could conceivably have been available would have been in the nature of projections, the court observed that Petitioner "expressly disavowed" reliance on any internal projections and "failed to identify any other source of . . . information that [Hanover] was allegedly obligated to disclose." *Id.*

Moreover, in contrast to the "disasterous" results and the "extreme departure from publicly known trends" at issue in *Shaw,* the information Petitioner herein claims was subject to mandatory disclosure consists of a mere 2% difference in return rates for only a single incomplete fiscal quarter, compared with the return rate for an *entire* fiscal year.

These significant factual distinctions argue strongly against the need for this Court to review the decision below, which clearly turned on a unique factual context.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: August 12, 1996